(2)

No. 90-73

FILED
AUG 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

BRAD L. SIMMONS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

ANDREW T. CITRIN
(Counsel of Record)
ROBERT T. CUNNINGHAM, JR.
CUNNINGHAM, BOUNDS, YANCE CROWDER AND BROWN
Post Office Box 66705
Mobile, Alabama 36660
(205) 471-6191

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. The Fraud Perpetrated Against Respondent 2

B. The Jury Verdict 3

C. Review by the Alabama Courts 4

SUMMARY OF THE ARGUMENT 5

REASONS FOR DENYING THE WRIT 7

I. PETITIONER FAILED TO TIMELY AND PROPERLY RAISE ANY FEDERAL CONSTITUTIONAL CHALLENGES TO THE IMPOSITION OF PUNITIVE DAMAGES AGAINST A PRINCIPAL UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR 7

II. PETITIONER'S REMAINING DUE PROCESS CHALLENGES DO NOT MEET THE REQUIREMENTS OF RULE 17 11

III. PLENARY REVIEW WILL NOT RESULT IN THE ESTABLISHMENT OF PRINCIPLES OF CONSTITUTIONAL LAW APPLICABLE BEYOND THIS CASE BECAUSE THE LEGAL STANDARDS AT ISSUE WERE UNIQUE TO ALABAMA AND HAVE BEEN SUPERSEDED BY LEGISLATIVE ENACTMENT 13

TABLE OF CONTENTS – Continued

Page

IV. RESPECT FOR ONGOING STATE REFORM EFFORTS AND RECENT EVIDENCE ABOUT THE ACTUAL IMPACT OF PUNITIVE DAMAGES CASTS DOUBT ON THE WISDOM OF CONSTITUTIONALIZING PROCEDURAL REQUIREMENTS FOR PUNITIVE DAMAGES AWARDS 16

V. THE LEGAL STANDARDS GOVERNING THE AWARD OF PUNITIVE DAMAGES IN THIS CASE DO NOT PRESENT ANY OF THE POTENTIAL CONSTITUTIONAL INFIRMITIES IDENTIFIED BY MEMBERS OF THIS COURT 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 18, 21, 22, 23

Aetna Life Ins. Co. v. Lavoie, 505 So.2d 1050 (Ala. 1987).....25, 26

Ah You Man v. Raymark Indus., 728 F. Supp. 1461 (D. Hawaii 1989) 12

Alabama Power Co. v. Capps, 519 So.2d 1328 (Ala. 1988)..... 9

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 100 L.Ed.2d 62 (1988).....9, 10, 18, 21, 22

Boots Mills v. Boston & M.R.R., 218 Mass. 582, 106 N.E. 680 (1914)..... 19

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S.Ct. 2902 (1989)..... 6, 21, 23

Central Alabama Electric Coop. v. Tapley, 546 So.2d 371 (Ala. 1989) 15, 26

City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 47 N.E.2d 265 (1943) 19

Clardy v. Sanders, 551 So.2d 1057 (Ala.), *cert. denied*, 110 S.Ct. 376 (Nov. 6, 1989)..... 22

Combined Ins. Co. v. Ainsworth, 763 P.2d 673 (Nev.), *cert. denied*, 110 S.Ct. 376 (Nov. 6, 1989)..... 22

Eichenseer v. Reserve Life Ins. Co., 881 F.2d 1355 (5th Cir. 1989) 13

F.D.I.C. v. W.R. Grace & Co., 691 F. Supp. 87 (1988) *aff'd in relevant part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1524 (1990)..... 12

TABLE OF AUTHORITIES – Continued

Page

Green Oil v. Hornsby, 539 So.2d 218 (Ala. 1989) 15, 24, 25, 26

Guy v. Commonwealth Life Ins. Co., 698 F. Supp. 1305 (N.D. Miss. 1988), *aff'd in relevant part*, 894 F.2d 1407 (5th Cir. 1990) 13

Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986) 4, 14, 15, 24, 27

Hicks v. Huggins, 405 So.2d 1324 (Ala. Civ. App.), *cert. denied*, 405 So.2d 1328 (Ala. 1981) 9

Horowitz v. Schneider National, Inc., 708 F. Supp. 1573 (D. Wyo. 1989) 13

In re Air Crash Disaster at Sioux City, Iowa, 734 F. Supp. 1425 (N.D. Ill. 1990) 12

Industrial Chemical and Fiberglass Corp. v. Chandler, 547 So.2d 812 (Ala. 1989) 26

Jaffree v. Board of School Commn'rs of Mobile County, 459 U.S. 1314 (1983) 11

Leonen v. Johns-Manville Corp., 717 F. Supp. 272 (D.N.J. 1989) 13

Linthicum v. Nationwide Life Insurance Co., 150 Ariz. 326, 723 P.2d 675 (1986) 20

Lockett v. Ohio, 438 U.S. 586 (1978) 28

Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927) 6, 11

Maki v. Aluminum Building Products, 73 Wash.2d 23, 436 P.2d 186 (1968) 19

Marion v. Hall, 429 So.2d 937 (Ala. 1983) 9

McCleskey v. Kemp, 481 U.S. 279 (1987) 28

TABLE OF AUTHORITIES – Continued

Page

McCutchen v. Liberty Mutual Ins. Co., 699 F. Supp. 701 (N.D. Ind. 1988) 12

McDowell v. Key, 557 So.2d 1243 (Ala. 1990) ... 4, 26, 27

Miller v. Cudahy, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 3265 (1989) 12

Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (1975) 19

Pacific Mutual v. Haslip, 110 S.Ct. 1780 (1990) 8

Pacific Mutual Life Ins. Co. v. Haslip, 553 So.2d 537 (Ala. 1989) 8

Pacileo v. Walker, 446 U.S. 1307 (1980) 11

Potomac Electric Power Co. v. Smith, 79 Md. App. 591, 558 A.2d 768 (1989) 12

Puppe v. A.C. and S., Inc., 733 F. Supp. 1355 (D.N.D. 1990) 12

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 16

Singleton v. Wulff, 428 U.S. 106 (1976) 8

Southern Life & Health Ins. Co. v. Whitman, 358 So. 2d 1025 (Ala. 1978) 15, 24

Standard Oil Co. v. Missouri, 224 U.S. 270 (1912) 11

Stoner v. Nash Finch, Inc., 446 N.W.2d 747 (N.D. 1989) 12

Tabor v. Hutson, 5 Ind. 322 (1854) 12

Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 222 A.2d 220 (1966) 20

Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985) 20

Vincent v. Morgan's Louisiana & T.R. & S.S. Co., 140 La. 1027, 74 So. 541 (1917) 19

Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980) 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Ala. Code §§ 6-11-20 through 6-11-30 ..... 7, 14, 18, 20

Alaska Stat. § 09.17.020 (Supp. 1988).....18, 20

Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990).....18, 20

Colo. Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986).....18, 20, 21

Conn. Gen. Stat. § 52-240(b) (Supp. 1989) 18

Fla. Stat. Ann. §§ 768.72 through 768.74 (West Supp. 1989) 18, 20, 21

Ga. Code Ann. § 51-12-5.1 (Supp. 1989).....18, 20

Idaho Code § 6-1604 (Supp. 1989).....18, 21

Ill. Ann Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989) 18

Ind. Code Ann. § 34-4-34-2 (Burns 1986).....19, 20

Iowa Code Ann. § 668A.1 (West 1987) 19, 20

Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989).....19, 20

Ky. Rev. Stat. §§ 411.184, 411.186 (1988).....19, 20

Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988) ..19, 20

Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990); 537-675 (Vernon Supp. 1988)..... 19

Mont. Code Ann. § 27-1-221 (1987).....19, 20

TABLE OF AUTHORITIES – Continued

Page

Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989) 19, 20

N.H. Rev. Stat Ann. § 507:16 (Supp. 1988)..... 19

N.J. Stat. Ann. § 2A:58C-5 (West 1987).....19, 20

N.D. Cent. Code § 32-03.2-11 (Supp. 1987) 19, 20

Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988) .19, 20

Okla. Stat. Ann. tit. 23, § 9 (West 1987).....19, 20

Or. Rev. Stat. §§ 30.925; 18.540, 41.315 (1987).....19, 20

S.C. Code Ann. § 15-33-135 (Supp. 1988).....19, 20

S.D. Rev. Code § 21-1-4.I (1987).....19, 20

Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 *et seq.* (Vernon Supp. 1990).....19, 20

Utah Code Ann. § 78-18-1 (Supp. 1989) 19, 20

Va. Code Ann. 8.01-38.1 (Supp. 1989) 19, 20

MISCELLANEOUS:

Punitive Damages: A Constructive Examination, (Report of the Special Committee on Punitive Damages, Section of Litigation, American Bar Association) (Nov. 1986)..... 17

S. Daniels & J. Martin, *Myth and Reality in Punitive Damages,* (ABF Working Paper #8911)..... 17

S. Ct. R. 17.1 .....12, 13

No. 90-73

In The

Supreme Court of the United States

October Term, 1990

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

BRAD L. SIMMONS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner General American's statement of the case mischaracterizes the relationship it enjoyed with its agent, Willie Foster. Petitioner refers (Pet. at pp. i and 2) to Foster as an "independent contractor" and "independent agent". Petitioner insists on this nomenclature even though the Alabama Supreme Court, applying settled principles of state law not challenged here, expressly found that Foster was acting within the line and scope of his employment as a *soliciting* agent when he defrauded respondent Simmons. In fact, by written contract, General

American expressly appointed Foster "for the purpose of *procuring in person applications for all forms of Individual Life Insurance. . . .* " App. A, 6a. In addition, petitioner trained Foster in selling its insurance and issued Foster a company training manual outlining petitioner's policies. App. A, 10a. It is crucial to understand that, despite petitioner's attempt in its written contract to disclaim any agency relationship with Foster, the jury found as a matter of fact that Foster was acting as an employee of petitioner at the time he defrauded Simmons. App. A, 10a.

A. The Fraud Perpetrated Against Respondent

On May 7, 1986, petitioner's agent visited Simmons at his workplace to discuss burial insurance for Simmons' wife. Unable to sell Simmons a burial insurance policy, Foster offered Simmons a $10,000 life insurance policy issued by petitioner General American. Foster gave Simmons an application for his wife to complete and sign. App. A, 2a.

Shortly thereafter, on May 30, 1986, Foster returned to Simmons' workplace to obtain the completed application and collect the annual premium. Upon receipt of the application, Foster issued Simmons a policy of "interim insurance" which was designed to temporarily insure Mrs. Simmons until General American issued the actual policy or determined that she was not insurable. The interim insurance policy expressly stated that the interim insurance did not terminate until "the date we [General American] determine that you do not qualify as a standard risk and elect to terminate the interim insurance." In

response to a direct question concerning when coverage became effective, Foster told Simmons that his wife was covered "[j]ust as soon as I get that [premium] check, if it's any good."[1] Simmons paid Foster the entire annual premium for the insurance at that time. App. A., 2a and 10a.

Approximately one month later, on July 4, 1986, Mrs. Simmons died from a heart attack. As of the date of Mrs. Simmons' death, General American had not yet issued an insurance policy and, more importantly, had not determined that Mrs. Simmons did "not qualify as a standard risk", as required by the interim insurance policy.

Simmons filed a claim with General American on July 18, 1986. General American refused to pay under the interim insurance policy because it claimed the interim insurance did not become effective *until it was determined* that an applicant qualified as a "standard risk". Because General American had not made its determination with respect to Mrs. Simmons until after her death, it claimed Mrs. Simmons was not covered under the interim insurance policy. App. A, 3a. In short, General American took the position that the interim insurance policy did not provide any "interim" insurance at all.

B. The Jury Verdict

Simmons sued General American and its soliciting agent, Foster, for breach of contract and for intentional

---

[1] Foster made this representation knowing the interim insurance was subject to numerous terms and conditions.

and reckless misrepresentation. Simmons claimed $10,000.00 in compensatory damages under both the contract and fraud counts. App. A., 25a. The trial court instructed the jury, without objection, that Mr. Simmons' compensatory damages for fraud were $10,000.00. App. A, 25a. The jury returned a general verdict against both General American and Foster on the fraud count, and assessed damages in the amount of $2.5 million. The trial court denied petitioner's motion for new trial and remittitur "on the condition that [Simmons] file with this court within 14 days a remittitur of damages in the sum of $1,900,000 . . . . " App. C, 33a. Simmons accepted the trial court's remittitur of damages.

C. Review by the Alabama Courts

Upon petitioner's motion for new trial and remittitur, the trial court carefully reviewed the evidence and the jury's verdict pursuant to the common law procedures set forth in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). App. C, 31a-33a. At this point, petitioner was free, indeed obligated, under Alabama law to offer evidence that the jury's verdict would punish the defendant more severely than was warranted by its misconduct. *McDowell v. Key, supra*, 557 So.2d at 1249. However, petitioner offered no evidence whatsoever as to the financial or other impact the jury's award would or could have on petitioner.

Nevertheless, following a hearing on petitioner's motion for new trial and remittitur, the trial court independently determined, based upon its review of the evidence offered at trial, that the jury's award of $2.5 million

was "too much for the conduct of which the defendants were guilty". App. C, 32a. The trial court also compared the jury's verdict with other awards in similar cases. App. A, 23a. Based on these findings, the trial court conditioned the denial of petitioner's motion for new trial upon Simmons' acceptance of a remittitur of more than 75% of the jury's verdict.

Following the trial court's review of the punitive damages award, the Supreme Court of Alabama conducted a *de novo* review of the jury's verdict and the trial court's ruling and compared the award with awards in similar cases. After comparing the remitted award with awards in similar cases, and considering the gravity of the wrong, the Alabama Supreme Court affirmed the trial court's remittitur. All seven justices sitting on the case agreed that the amount of punitive damages, as remitted, was not excessive or disproportionate to the wrong committed by defendants.

SUMMARY OF THE ARGUMENT

Petitioner proposes to raise substantial constitutional challenges to the assessment of punitive damages against a principal under the doctrine of *respondeat superior*. However, as petitioner admits, no such issues were raised in any of the courts below. In the courts below, petitioner challenged only the *factual* basis for the imposition of *liability* under the doctrine of *respondeat superior*. Petitioner did not invoke, expressly or by implication, the Due Process Clause or the constitutionality of punishing a principal for the acts of an agent. As admitted in the

petition, petitioner's arguments constituted only a "state law challenge". Consequently, neither of the courts below considered this issue. Due to the absence of a properly developed record with respect to this important issue, this Court should deny review.

With respect to the two remaining questions petitioner proposes, Rule 17 provides that review on writ on certiorari will be granted "only when there are special and important reasons therefor." None of the considerations enumerated in Rule 17 are presented by General American's petition. The Alabama Supreme Court's decision does not conflict with the decision of a Federal Court of Appeals or any state court of last resort. Nor does the decision conflict with any decision of this Court. More importantly, the Alabama Supreme Court has not decided "an important question of federal law which has not been, but should be, settled by this Court. . . . " This Court has addressed the precise issue raised by petitioner, including one case from the state of Alabama. *See, Louis Pizitz Dry Goods Co. v. Yeldell,* 274 U.S. 112 (1927).

Although this Court has indicated that the imposition of punitive damages in the absence of adequate legislative or common law standards may raise a substantial constitutional issue, *cf. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2902 (1989), the present case is not an appropriate setting for considering that issue. The procedures applied in punitive damages cases in Alabama are far from standardless; the jury's discretion is substantially confined and is subjected to searching *de novo* scrutiny both at the trial and on appeal. Additionally, Alabama in 1987 enacted comprehensive "tort reform" legislation that places a ceiling on punitive

damages in most cases, drastically narrows the imposition of vicarious liability for punitive damages, and imposes numerous other procedural safeguards. Ala. Code §§ 6-11-20 through 6-11-30 (1987). These provisions are not applicable to the present case – which was brought before the effective date of the legislation – but they render petitioner's challenges to Alabama's system for imposing punitive damages of historical interest only.

Petitioner seeks review of a jury's verdict which has already been drastically remitted (over 75%) by the trial court. Not only is the process which was afforded petitioner more than adequate to satisfy the Due Process Clause, but the very substantial remittitur afforded defendant in this case demonstrates that Alabama's process of awarding and reviewing punitive damages protects defendants from arbitrary or excessive jury verdicts.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO TIMELY AND PROPERLY RAISE ANY FEDERAL CONSTITUTIONAL CHALLENGES TO THE IMPOSITION OF PUNITIVE DAMAGES AGAINST A PRINCIPAL UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR.

Petitioner proposes to raise substantial constitutional challenges to the assessment of punitive damages against a principal under the doctrine of *respondeat superior*. However, as petitioner admits, no such issues were raised in any of the courts below. Pet. at p. 12, n. 7. In the courts below, petitioner challenged only the *factual* basis for the imposition of *liability* under the doctrine of *respondeat*

superior. Petitioner did not invoke, expressly or by implication, the Due Process Clause or the constitutionality of punishing a principal for the acts of an agent. As admitted in the petition, petitioner's arguments constituted only a "state law challenge". Pet. at p. 8. Consequently, neither of the courts below considered this issue.

> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. . . . [T]his is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' "

Singleton v. Wulff, 428 U.S. 106, 120 (1976) (citation omitted).

Petitioner suggests (Pet. at 12, n. 7) that this issue "may be noticed by this Court in light of the grant of certiorari in *Pacific Mutual* [*v. Haslip,* 110 S.Ct. 1780 (1990)] and the fact that, given the resolution of this question by the Supreme Court of Alabama in *Pacific Mutual,* petitioner's additional reliance under the Due Process Clause would have been a futile act." Petitioner's assertion that raising this issue in the courts below would have been a "futile act" is spurious.

The Alabama Supreme Court did not release the decision in *Pacific Mutual* until September 15, 1989, three and one-half months after all appellate briefs were submitted to that court in the instant case. *See Pacific Mutual Life Ins. Co. v. Haslip,* 553 So.2d 537 (Ala. 1989). In other words, the Alabama Supreme Court had not issued a ruling on

this issue until well after petitioner's counsel had submitted its written briefs in this case.

Even if petitioner had attempted to raise this issue for the first time on appeal before the Alabama Supreme Court, that court would have denied review. Under settled Alabama law, a party "cannot 'invoke action by a court and have a case tried on certain issues and then later, when dissatisfied with the result, raise an entirely new issue, such as the constitutionality of the statutes under which he was proceeding. . . .' " *Alabama Power Co. v. Capps*, 519 So.2d 1328, 1330 (Ala. 1988), *quoting, Talley v. A&M Construction Co.*, 284 Ala. 371, 373, 225 So.2d 359, 360 (1969), *cert. denied*, 397 U.S. 995 (1970). In Alabama, constitutional issues cannot be raised for the first time on appeal. *Hicks v. Huggins*, 405 So.2d 1324 (Ala. Civ. App.), *cert. denied*, 405 So.2d 1328 (Ala. 1981); *Marion v. Hall*, 429 So.2d 937 (Ala. 1983).

Because petitioner failed to raise any constitutional challenge, this Court should follow its customary practice of refusing to grant review on questions "not pressed or passed upon below". In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62 (1988), this Court noted that it declines to exercise its certiorari jurisdiction under circumstances very similar to the instant case.

> "In determining whether to exercise jurisdiction over questions not properly raised below, the Court has focused on the policies that animate the 'not pressed or passed upon below' rule. These policies are first, comity to the States, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal. See, *Webb v. Webb, supra*, at 500-501, 68 L.Ed.2d 392, 101

> S.Ct. 1889. Because the chief issue appellant would have us resolve – whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases – is a question of some moment and difficulty, these policies apply with special force. See, *Illinois v. Gates, supra,* at 224, 76 L.Ed.2d 527, 103 S.Ct. 2317 ('where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion'); *Mishkin v. New York,* 383 U.S., at 512-513, 16 L.Ed.2d 56, 86 S.Ct. 958 ('The far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision')."

Id. at 79, 100 L.Ed.2d at 72-73. The factors which led this Court to deny review of difficult constitutional issues in *Crenshaw* are present with respect to at least one of petitioner's proposed issues. Petitioner has offered no compelling reason why the principles which led this Court to deny review in *Crenshaw* should not be followed in the instant case.

Petitioner's failure to timely raise this issue below has resulted in the complete absence of a properly developed record. In the absence of such a record, the difficult constitutional question proposed to be raised by petitioner would be made even more difficult. As noted in *Crenshaw,* this Court adheres *scrupulously* to the customary limits on its discretion when difficult and important issues are involved. The issue raised by petitioner is certainly difficult and should not be reviewed in this case.

II. PETITIONER'S REMAINING DUE PROCESS CHALLENGES DO NOT MEET THE REQUIREMENTS OF RULE 17.

Petitioner proposes to challenge the award of punitive damages on the ground the award was the product of standardless, arbitrary jury decision-making. There is no prior, controlling opinion of this Court that is inconsistent with the Alabama Supreme Court's decision in this case, and no conflict between the decision below and any other state supreme court or federal court of appeals. *See, Jaffree v. Board of School Commn'rs of Mobile County,* 459 U.S. 1314 (1983); *Pacileo v. Walker,* 446 U.S. 1307 (1980).

In fact, the Alabama Supreme Court's decision is consistent with the decisions of this Court and other state and federal courts. In *Standard Oil Co. v. Missouri,* 224 U.S. 270 (1912), this Court explicitly rejected a challenge indistinguishable from the one General American now raises. Upholding a civil fine, the Court turned aside a due process claim that there was "any invalidity in the judgment because there was no statute fixing a maximum penalty [and] no rule for measuring damages." *Id.* at 285. In addition, in *Louis Pizitz Dry Goods Co. v. Yeldell,* 274 U.S. 112 (1927), this Court upheld an Alabama statute authorizing punitive damages for wrongful death against a claim that it denied due process because the jury may "fix the penalty according to its unbridled discretion, without any method of ascertainment, and without any limit to the amount it may impose by way of punishment or penalty upon defendant." Brief for Plaintiff in Error in No. 171, at 6. Hence, the Alabama Supreme Court has not decided "an important question of federal law which has

not been, but should be, settled by this Court. . . . " S.Ct. R. 17.1(c).

Moreover, the Alabama Supreme Court's decision does not conflict with the decision of the Federal Court of appeals or any state court of last resort. S. Ct. R. 17.1(b). Every state and federal court to have considered the question has likewise ruled that the common law method for assessing punitive damages satisfied due process.[2]

---

[2] In *McCutchen v. Liberty Mutual Ins. Co.*, 699 F. Supp. 701, 709 (N.D. Ind. 1988), the court emphasized that "since the earliest of times, Indiana has recognized the need to have juries exercise the discretion which defendant now criticizes," *citing Tabor v. Hutson*, 5 Ind. 322 (1854). *Cf. F.D.I.C. v. W.R. Grace & Co.*, 691 F. Supp. 87 (1988) *aff'd in relevant part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1524 (1990) (standards governing the jury's assessment of punitive damages are purposefully flexible to permit the jury to achieve community consensus). Several courts have noted the complete lack of precedent supporting a due process challenge to common law assessment of punitive damages. *See Miller v. Cudahy*, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 3265 (1989); *In re Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425 (N.D. Ill. 1990); *McCutchen v. Liberty Mutual Ins. Co., supra.*

Several cases have upheld the constitutionality of common law standards no more specific than those in this case. *See, Ah You Man v. Raymark Indus.*, 728 F. Supp. 1461 (D. Hawaii 1989) (degree of wrongdoing and amount required to punish); *F.D.I.C. v. W.R. Grace & Co.*, 691 F. Supp. 87 (1988) *aff'd in relevant part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1524 (1990) (amount sufficient to punish and deter); *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989) (reasonable sum to set an example and punish); *Puppe v. A.C. and S., Inc.*, 733 F. Supp. 1355 (D.N.D. 1990) (amount needed to deter); *Potomac*

(Continued on following page)

Because the petition fails to meet the criteria enumerated by this Court in Rule 17 for the granting of petitions of certiorari, the instant petition should be denied.

III. PLENARY REVIEW WILL NOT RESULT IN THE ESTABLISHMENT OF PRINCIPLES OF CONSTITUTIONAL LAW APPLICABLE BEYOND THIS CASE BECAUSE THE LEGAL STANDARDS AT ISSUE WERE UNIQUE TO ALABAMA AND HAVE BEEN SUPERSEDED BY LEGISLATIVE ENACTMENT.

Plenary review of this case is inappropriate because the Court would be reviewing a system for assessing punitive damages that no longer exists in Alabama or anywhere else.

In 1987, Alabama enacted tort reform legislation placing new and extensive substantive and procedural constraints on punitive awards. In particular:

1. Plaintiffs must meet a burden of "clear and convincing" evidence;

(Continued from previous page)

Electric Power Co. v. Smith, 79 Md. App. 591, 558 A.2d 768 (1989) (amount sufficient to punish and deter). Other cases involved common law standards comparable to those governing the trial court's review of the award in this case. *See Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989); *Horowitz v. Schneider National, Inc.*, 708 F. Supp. 1573 (D. Wyo. 1989); *Guy v. Commonwealth Life Ins. Co.*, 698 F. Supp. 1305 (N.D. Miss. 1988), *aff'd in relevant part*, 894 F.2d 1407 (5th Cir. 1990).

2. Punitive damages may be awarded only where conscious or deliberate conduct is at issue;

3. No presumption of correctness is accorded by the trial court to the jury's decision respecting punitive damages, nor by the appellate court to any trial court rulings;

4. If the jury awards punitive damages, either party may move the trial court for a hearing or the admission of additional evidence on the propriety of the award. Any relevant evidence is admissible, including "the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether the defendant has been guilty of the same or similar acts in the past, the nature and extent of any effort by the defendant to remedy the wrong, and the opportunity or lack thereof the plaintiff gave the defendant to remedy the wrong complained of";[3]

5. Punitive damages may not be awarded against a principal for conduct of the agent unless the principal has ratified, endorsed or benefited from the agent's conduct; and,

6. Punitive damages have, with very limited exceptions, been capped at $250,000.

Ala. Code §§ 6-11-20 through 6-11-30. Although those legislative provisions did not apply to the present case, they have been applied in force in Alabama for more than three years and will govern all present and future actions raising punitive damages claims like those at issue here.

---

[3] Similar protections had been established by the Alabama Supreme Court as a matter of common law in *Hammond* and were followed in this case.

A ruling on the Alabama safeguards in effect before this tort reform legislation would thus provide little guidance as to the constitutionality of Alabama's current procedure.

Nor would a ruling in this case provide guidance as to the procedures currently in effect in *other* States. To respondent's knowledge, no state makes use of a configuration of common law substantive limitations and procedural checks on jury discretion similar to those in force in Alabama at the time this case was reviewed by the lower courts. Before the effective date of the tort reform legislation, Alabama law bifurcated punitive damages decisions. In making initial assessment, juries were required to evaluate the gravity of the wrong at issue and the extent to which punitive damages were needed to deter similar wrongs. *See Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989); *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). To prevent bias, all evidence of the plaintiff's and defendant's financial condition was inadmissible. *See Southern Life & Health Ins. Co. v. Whitman*, 358 So.2d 1025 (Ala. 1978).

In cases in which juries awarded punitive damages, the trial court was required to conduct a post-verdict evidentiary hearing, applying substantive criteria identified by the Alabama Supreme Court. *See Hammond*, 493 So.2d at 1378-79. The trial court was also required to make written findings stating reasons for accepting or modifying the jury verdict, and these findings were subject to *de novo* review by the Alabama Supreme Court. *See Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371 (Ala. 1989).

Because no other State uses this constellation of safeguards against improper punitive damage awards, plenary review of this case would provide minimal guidance as to the constitutionality of *other* States' procedural and substantive safeguards. General American's challenge to the Alabama law in force in 1987 thus presents no issues of national significance, and no issues of continuing significance even within Alabama. At bottom, General American seeks review of fact-bound, historical questions relevant to no one but itself. These considerations make review particularly inappropriate. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (" '[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . . ") (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

IV. RESPECT FOR ONGOING STATE REFORM EFFORTS AND RECENT EVIDENCE ABOUT THE ACTUAL IMPACT OF PUNITIVE DAMAGES CASTS DOUBT ON THE WISDOM OF CONSTITUTIONALIZING PROCEDURAL REQUIREMENTS FOR PUNITIVE DAMAGES AWARDS.

Although this Court has indicated that plenary review may be warranted to determine the constitutionality of punitive damages awarded in the absence of legislative or common law standards, fundamental notions of judicial restraint and federalism counsel against review.

First, the factual assumption that runaway juries are awarding punitive damages bearing no reasonable or predictable relationship to harm inflicted by defendants is open to serious question. A very recent empirical analysis by the American Bar Foundation found *no* substantial increase in either the frequency or the amount of punitive awards. S. Daniels & J. Martin, *Myth and Reality in Punitive Damages*, 34, 41-45 (ABF Working Paper #8911). Based on a careful nationwide survey of tens of thousands of verdicts, the study found that: the principal empirical claims made by General American are "distorted"; "the general pattern is one of low to modest awards"; and "punitive damages were awarded infrequently." *Id.* at 34, 41-45. The study warned that any judicial and legislative "reforms" of punitive damages systems "are likely to be . . . based on an unfounded (and perhaps manufactured) notion of a crisis." *Id.* at 62-64.[4]

In 1989, the United States General Accounting Office published a study likewise concluding that punitive awards correlated strongly with the size of compensatory awards, and that appellate review provided a substantial, well-functioning safeguard against excessiveness. *See* Products Liability: Verdict and Case Resolution in Five States (GAO/HRD-88-99, Sept. 1989) at 29, 31-32, 41, 69. A special committee of the American Bar Association also recently found "no clear evidence of a present or impending crisis in punitive damages." *Punitive Damages: A Constructive Examination*, at 1-2 (Report of the Special

---

[4] This study will be published in the October 1990 issue of the Minnesota Law Review.

Committee on Punitive Damages, Section of Litigation, American Bar Association) (Nov. 1986).

Hence, no clear consensus exists on the nature or extent of the problem, or on what substantive standards and procedural mechanisms, if any, should be required. Issues this complex and controversial are far better resolved through the legislative process after appropriate legislative fact-finding. Defendants like General American have ample access to the legislative process so there is no need for this Court to intervene to correct for failure of that process. Tort reform like that enacted in Alabama and elsewhere is substantial evidence that petitioner and other potential defendants are fully able to protect their interests in the legislative arena.

Second, review by this Court would pretermit an active re-examination underway in the States. Since the Court's first expression of concern about punitive damages in *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828 (1986), and its subsequent invitation to the States in *Bankers' Life* to "enact legislation addressing punitive damage awards," *Bankers' Life,* 108 S.Ct. at 1651, the majority of states, including Alabama, have enacted substantial legislative reforms designed to limit awards of punitive damages[5] – and other states are

---

[5] *See* Ala. Code § 6-11-20 *et seq.* (Supp. 1988); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990); Colo Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986); Conn. Gen. Stat. § 52-240(b) (Supp. 1989) (applicable to product liability cases); Fla. Stat. Ann. §§ 768.72 through 768.74 (West Supp. 1989); Ga. Code Ann. § 51-12-5.1 (Supp. 1989); Idaho Code § 6-1604 (Supp. 1989); Ill. Ann. Stat.

(Continued on following page)

considering such reforms. This ongoing nationwide effort by state legislatures makes it unnecessary and inappropriate for the Court to interfere – particularly in a State, like Alabama, in the forefront of legislative reform.

State legislatures have enacted a broad range and variety of measures to guide the award of punitive damages. Of the forty-five states that permit an award of punitive damages,[6] twenty (including

---

(Continued from previous page)

ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1 (West 1987); Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989); Ky. Rev. Stat. §§ 411.184, 411.186 (1988); Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988); Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990), 537-675 (Vernon Supp. 1988); Mont. Code Ann. § 27-1-221 (1987); Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989); N.H. Rev. Stat Ann. § 507:16 (Supp. 1988); N.J. Stat. Ann. § 2A:58C-5 (West 1987) (applicable to product liability cases); N.D. Cent. Code § 32-03.2-11 (Supp. 1987); Ohio Rev. Code Ann § 2315.21 (Page Supp. 1988); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. §§ 30.925 (applicable to product liability cases) 18.540, 41.315 (1987); S.C. Code Ann. § 15-33-135 (Supp. 1988); S.D. Rev. Code § 21-1-4.I (1987); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 *et seq.* (Vernon Supp. 1990); Utah Code Ann. § 78-18-1 (Supp. 1989); Va. Code Ann. 8.01-38.1 (Supp. 1989).

[6] Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington have abolished punitive damages except where explicitly authorized by statute. *See Vincent v. Morgan's Louisiana & T.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 (1917); *Boott Mills v. Boston & M.R.R.*, 218 Mass. 582, 106 N.E. 680 (1914); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 47 N.E. 2d 265 (1943); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988); *Maki v. Aluminum Building Products*, 73 Wash. 2d 23, 436 P.2d 186 (1968).

Alabama)[7] now legislatively mandate that punitive damages may be awarded only where it is proved by at least "clear and convincing" evidence that the defendant engaged in the requisite conduct, and three other states have adopted this burden of proof as a matter of common law.[8]

Nine states have enacted legislation capping punitive awards.[9] Several states have enacted statutory provisions that: (1) specify standards guiding the determination or review of a punitive damage award;[10] (2) require or

---

[7] *See* Ala. Code § 6-11-20; Alaska Code § 09.17.020; Cal. Code § 3294; Georgia Code § 51-12.5.1(b); Ind. Code § 34-4-34-2; Iowa Code § 668A.1(1)(a); Kansas Code § 60-3701(c); Kentucky Code § 411.184(2); Minnesota Code § 549.20 Subdivision 1; Montana Code § 27-1-221(5); Nevada Code § 42.005(1); North Dakota Code § 32-03.2-11; Ohio Code § 2315.21(c)(3); Oregon Code § 41.315; South Carolina Code § 15-33-135; South Dakota Code § 21-1-4.1; Utah Code 78-18-1(1).

[8] *See Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986) (*en banc*); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980).

[9] *See* Ala. Code § 6-11-21; Colo. Code § 13-21-103(1)(a); Fla. Code § 768.73(1)(a); Georgia Code § 51-12.5.1(g); Kansas Code § 60-3701(e); Nevada Code § 42.005.1; Oklahoma Code Title 23, § 9; Texas Code § 41.001; Virginia Code § 8.01-38.1. In addition, the Connecticut Supreme Court, in *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 222 A.2d 220 (1966), held that an award of punitive damages is limited to plaintiff's litigation expenses less taxable costs.

[10] *See* Fla. Code §§ 768.73, 768.74; Kansas Code § 60-3701; Kentucky Code § 411.186; Minn. Code § 549.20 Subdivision 2; Mont. Code § 27-1-221; N.J. Code § 2A:58C-5; Oregon Code § 30.925.

permit bifurcation of punitive damages trials;[11] (3) limit the admissibility of evidence of defendant's wealth;[12] and (4) require court approval prior to the inclusion of a claim for punitive damages in a complaint.[13]

The abundance of legislative measures since 1986 demonstrates the wide variety of possible approaches to guiding jury discretion in awarding punitive damages. Because the states are addressing exactly the issues identified in *Lavoie, Bankers Life* and *Browning-Ferris,* review by this Court is unnecessary and inappropriate.

Review at this point would constitute an inappropriate intervention into a well-functioning state judicial and legislative effort to keep abreast of evolving concepts of fairness and the dictates of the United States Constitution. In *Bankers Life & Casualty Co. v. Crenshaw,* this Court expressed a clear preference for state common law and legislative solutions rather than a constitutional ruling federalizing the law of punitive damages, which are an important and longstanding part of state tort law.[14]

---

[11] *See, e.g.,* Georgia Code § 51-12.5.1(d)(2).

[12] *See, e.g.,* Colorado Code § 13-21-102(6).

[13] *See, e.g.,* Idaho Code § 6-1604(2).

[14] The *Crenshaw* Court observed:

> "Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more appropriate resolutions: the . . . State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims; failing that the . . . state courts may choose to resolve the issue by relying on the state

(Continued on following page)

Alabama has adopted far-reaching common law and legislative solutions. These reforms should be given time to be tested so that Alabama and other states can assess their efficacy and determine whether other changes might be needed.

This Court has repeatedly followed that course in declining to grant certiorari to review due process challenges to common law systems for determining punitive damages, where subsequent legislative reform had substantially altered the governing standards and procedures. *E.g., Clardy v. Sanders*, 551 So.2d 1057 (Ala.), *cert. denied*, 110 S.Ct. 376 (Nov. 6, 1989); *Combined Ins. Co. v. Ainsworth*, 763 P.2d 673 (Nev.), *cert. denied*, 110 S.Ct. 376 (Nov. 6, 1989).[15]

Exercise of the Court's jurisdiction in this case would "short-circuit", *Banker's Life*, 108 S.Ct. at 1651, the reform efforts of state legislatures, which represent the collective judgment of constituents and which are particularly able, based on intimate knowledge of local conditions, to experiment with varying approaches to punitive damages that balance competing social and policy interests. For

---

(Continued from previous page)

constitution or on some other adequate and independent nonfederal ground. . . . "

486 U.S. at 80 (footnote omitted).

[15] Indeed, the Alabama procedures in effect when this case was tried were the State's initial judicial response to this Court's discussion of Alabama's prior common law rules governing punitive damages. *See Aetna Ins. Co. v. Lavoie*, 475 U.S. 813, 828-829 (1986).

this additional reason, the Court should deny General American's petition.

V. THE LEGAL STANDARDS GOVERNING THE AWARD OF PUNITIVE DAMAGES IN THIS CASE DO NOT PRESENT ANY OF THE POTENTIAL CONSTITUTIONAL INFIRMITIES IDENTIFIED BY MEMBERS OF THIS COURT.

Plenary review of this case would be unwarranted even if the factual record and legal context presented no serious obstacles to review. This case does not raise the sole due process issue identified by this Court as worthy of consideration: whether punitive damages may constitutionally be imposed by juries "given unbridled discretion," *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2924 (1989) (O'Connor, J., concurring in part), without statutory or common law standards constraining punitive awards. *See id.* at 2923 (Brennan, J., concurring). *See also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

Under Alabama common law, the jurors in this case were not "left largely to themselves" in deciding whether to award punitive damages. To the contrary, the jury's discretion was substantially confined and was subjected to searching *de novo* scrutiny both in a post-verdict evidentiary hearing in the trial court and on appeal.

In 1986, in reviewing the decision of the Alabama Supreme Court, this Court expressed some concern about the "lack of sufficient standards governing punitive damages awards." *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 828 (1986). Immediately thereafter, the Alabama courts and

legislature began fashioning significant procedural and substantive safeguards to ensure that judges and juries receive clear substantive guidance as to when punitive damages are appropriate, and to limit substantially the overall availability of punitive damages. As a result of these efforts, there can be no plausible claim that punitive damages awards in Alabama are the product of standardless and unreviewable jury discretion.

Alabama uses a bifurcated system for deciding whether punitive damages are appropriate. The jury primarily considers the "gravity of the wrong" in an effort to determine what amount is necessary to punish and deter the wrongdoers. *See Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989); *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). To minimize the risk of bias and prejudice, Alabama strictly forbids the introduction of any evidence in the presence of the jury about the financial circumstances of either the plaintiff or the defendant. *See Southern Life & Health Ins. Co. v. Whitman*, 358 So.2d 1025 (Ala. 1978).

Alabama provides another, perhaps unique, procedural safeguard. In *Hammond v. City of Gadsden*, 493 So.2d 1374, 1378-1379 (Ala. 1986), and *Green Oil v. Hornsby*, 539 So.2d 218, 223-224 (Ala. 1989), the Alabama Supreme Court required trial courts to hold a post-verdict *evidentiary* hearing in every case in which a jury awards punitive damages. Seven factors must be considered in deciding whether a punitive damages award is appropriate:

> "[1] Punitive damages should bear a reasonable relation to the harm that is likely to occur from the defendant's conduct as well as the

harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

"[2] The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or cover-up of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of responsibility.

"[3] If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of this profit, so that the defendant recognizes a loss.

"[4] The financial position of the defendant would be relevant.

"[5] All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

"[6] If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

"[7] If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award."

Green Oil Co. v. Hornsby, 539 So.2d at 223-224 (quoting *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)). The considerations set forth in *Hornsby* governed the Alabama Supreme Court's decision in this case. App. A, 22a-23a.

If a defendant believes a jury's award of punitive damages is excessive, the defendant may present evidence at such a hearing to show the jury's verdict is unreasonable, disproportionate, or economically destructive. *Industrial Chemical and Fiberglass Corp., v. Chandler,* 547 So.2d 812 (Ala. 1989); *Hornsby,* 539 So.2d at 224. In order to obtain a meaningful review of the jury's punitive damages award, it is the defendant's responsibility to come forward with evidence that the jury's award has a greater impact upon the defendant than was warranted by the defendant's misconduct. *McDowell v. Key,* 557 So.2d 1243, 1249 (Ala. 1990).

After this hearing, the trial judge is required to make written findings stating reasons for accepting or modifying the jury verdict. The trial court's evaluation of these factors is subject to *de novo* review on appeal. *Central Alabama Electric Coop. v. Tapley,* 546 So.2d 371 (Ala. 1989). Appellate courts are free to assess independently the factual basis for the amount of the award and can "order a new trial due to the excessiveness of the verdict" or "order a new trial unless the plaintiff accepts a remittitur." *Id.* at 377. The appellate court also "mak[es] a comparative analysis with other awards allowed in similar cases." *Aetna Life Ins. Co. v. Lavoie,* 505 So.2d 1050, 1053 (Ala. 1987).

Alabama has thus identified specific factors that bear on the appropriateness of punitive damages awards. Alabama gives a defendant the right to demonstrate that the amount of punitive damages awarded by the jury punishes it more severely than warranted by the defendant's

misconduct and financial condition. These comprehensive trial and appellate procedures ensure that the amount of punitive damages fits the offense.

Alabama's procedures were scrupulously followed in the present case. Upon petitioner's motion for new trial and remittitur, the trial court carefully reviewed the evidence and the jury's verdict pursuant to the common law procedures set forth in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). App. C, 31a-33a. At this point, petitioner was free, indeed obligated, under Alabama law to offer evidence that the jury's verdict would punish the defendant more severely than was warranted by its misconduct. *McDowell v. Key, supra*, 557 So.2d at 1249. However, petitioner offered no evidence whatsoever as to the financial or other impact the jury's award would or could have on petitioner.

Nevertheless, following a hearing on petitioner's motion for new trial and remittitur, the trial court independently determined, based upon its review of the evidence offered at trial, that the jury's award of $2.5 million was "too much for the conduct of which the defendants were guilty". App. C, 32a. The trial court also compared the jury's verdict with other awards in similar cases. App. A, 23a. Based on these findings, the trial court conditioned the denial of petitioner's motion for new trial upon Simmons' acceptance of a remittitur of more than 75% of the jury's verdict.

Following the trial court's review of the punitive damages award, the Supreme Court of Alabama conducted a *de novo* review of the jury's verdict and the trial court's ruling and compared the award with awards in

similar cases. After comparing the remitted award with awards in similar cases, and considering the gravity of the wrong, the Alabama Supreme Court affirmed the trial court's remittitur. All seven justices sitting on the case agreed that the amount of punitive damages, as remitted, was not excessive or disproportionate to the wrong committed by defendants.

This case illustrates that jury awards of punitive damages are indeed subjected to very real and substantial checks for excessiveness under Alabama law. Although the trial court did not employ any mathematical formula in deciding how much to remit the jury's verdict, the court did compare the jury's award with other awards in similar cases. Seven justices of the Alabama Supreme Court concurred in the trial court's assessment.

The mere absence of a legislatively prescribed range for punitive awards in no sense renders this common law regime so arbitrary or fundamentally unfair as to violate due process guarantees. As this Court has consistently recognized, state legislatures generally are "free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases. . . . " *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion). Even in capital cases, this court has recognized that juries must be able to consider an encompassing range of factors in making "the difficult and uniquely human judgments that defy codification and that build discretion, equity, and flexibility into a legal system." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (quotation omitted).

Petitioner has been afforded all the essentials of due process. The trial court's reduction of punitive damages

to less than 25% of the jury's verdict is telling of the substantial protections afforded defendants in Alabama against arbitrary or excessive jury verdicts.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ANDREW T. CITRIN
(Counsel of Record)
ROBERT T. CUNNINGHAM, JR.

CUNNINGHAM, BOUNDS, YANCE,
CROWDER AND BROWN
P.O. Box. 66705
Mobile, Alabama 36660

Attorneys for Respondent

Dated: August 13, 1990